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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked under Section 240(a) and Section 262 of the Judicial Code, as amended (28 U. S. C., Sections 347(a) and 377 respectively), and Supreme Court Rule XXXVIII, par. 5(b) and Rule XXXIX.

In conformity with the calendar practice of this Court, a separate formal motion for leave to file a petition for a writ of certiorari, pursuant to Judicial Code, Section 262, is being filed simultaneously herewith for docketing on the Miscellaneous Calendar. It is respectfully re-

quested that this petition and said motion be brought on for argument at the same time, and all statements contained herein and in the brief in support hereof, are, to the extent applicable, referable as well to said motion under Judicial Code, Section 262, and are urged in support of the granting of said motion.

Summary Statement.

Petitioner, Margaret C. Donovan, the plaintiff-appellant below, by her counsel, prays that a writ of certiorari, pursuant to Judicial Code Section 240(a), or, in the alternative, pursuant to Judicial Code Section 262, issue to review an order (R. 23) of the Circuit Court of Appeals for the Second Circuit, rendered March 23rd, 1948, in an action entitled Margaret C. Donovan, plaintiff, against Queensboro Corporation, et al., defendants. Said order granted defendants' motion to dismiss—for lack of jurisdiction—plaintiff's appeal to that Court. Plaintiff had appealed from such portion of an order (R. 9) dated November 24, 1947, of the District Court of the United States for the Eastern District of New York, as granted defendants' motion to require plaintiff, pursuant to the provisions of Sections 61-b and 64 of the General Corporation Law of the State of New York (Appendix to Petitioner's Brief, pp. 37-40) to give to the defendant, Garden Housing Corporation, security satisfactory to the District Court in the sum of $50,000 for defendant's expenses, including attorneys' fees, and staying all further proceedings by plaintiff pending deposit of the $50,000 security (R. 11). Said appeal—dismissed by the aforesaid order of the Circuit Court—also included an appeal from an order (R. 11) of said District Court, made and entered December 19, 1947, denying plaintiff's motion to modify the said order of the District Court dated November 24, 1947, so as to provide therein for the dismissal of the complaint should the required $50,000 security not be deposited within a stated time. The writ

is also asked for the purpose of reviewing the order of the said Circuit Court, made and entered on April 16th, 1948 (R. 35), denying plaintiff's petition for rehearing.

Statement of Facts.

This is an action in equity by the plaintiff as holder of a Voting Trust Certificate representing 111½ shares of stock of the defendant Garden Housing Corporation of the par value of $11,150, or approximately 2.35% of the 4,730 shares of stock of said corporation issued and outstanding. The suit was instituted in the United States District Court, for the Eastern District of New York. While it is a stockholder's derivative action for an accounting and recovery against officers and directors of said corporation for waste, mismanagement, and unlawful sale of corporate assets of the defendant Garden Housing Corporation, the primary relief requested is sought against Queensboro Corporation as the wrongful recipient and beneficiary of certain assets of said Garden Housing Corporation, so allegedly wasted, mismanaged and misappropriated, by the individual defendants, due, as alleged, to the domination and control by the Queensboro Corporation of the said Garden Housing Corporation and its officers and directors (R. 24). Plaintiff's cause of action alleges that the Queensboro Corporation, its officers and affiliated corporations, owned or controlled, directly or indirectly, approximately 87% of the stock of Garden Housing Corporation (R. 25).

The defendants, before answer, moved in the District Court to dismiss the amended complaint on the ground that diversity of citizenship had been collusively obtained and that the plaintiff was not the real party in interest, which motion was denied and no appeal was taken therefrom (R. 10), so that no issue of diversity is here involved, and it has been determined that the plaintiff has fulfilled the necessary jurisdictional requirements for bringing suit in the District Court.

However, on said motion, the defendants also moved in the alternative to require the plaintiff, pursuant to the provisions of Sections 61-b and 64 of the General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000, for reasonable expenses, including attorneys' fees, which might be incurred by it and by the other parties defendant for which said Garden Housing Corporation might become subject, and that, pending the deposit of such security, all further proceedings on the part of the plaintiff, be stayed.

The order of the District Court, by the Honorable Judge Inch, dated November 24th, 1947, granted the said alternative relief, ordering security for expenses and counsel fees in the sum of $50,000 and staying all proceedings on plaintiff's part, except for review, modification or vacation of the order, pending deposit of the $50,000 security (R. 11).

The plaintiff having urged, by affidavit filed in the District Court in opposition to said motion (R. 20), that she was not able to furnish any security other than the ordinary security for costs of $250.00, and her attorneys, being mindful of the customary practice to include in orders staying proceedings until the deposit of security, a proviso for the dismissal of the complaint if the security requirement should not be complied with within a limited time, moved to modify the said order of Judge Inch accordingly (R. 20). The motion requested modification of the order so as to provide that unless such security was furnished by a fixed date, then the action should be dismissed. Such a provision would have furnished, in so many words of the order and of record, a finality which could not be disputed to question plaintiff's right to appeal to the Circuit Court. Said motion to modify was denied by order (R. 11-12) of the District Court made and entered December 19th, 1947.

The plaintiff, through counsel upon oral argument in the District Court, by briefs submitted by her counsel

therein, by affidavit in the District Court (R. 26) and by reassertion in the Circuit Court, and in the petition for rehearing (R. 18, 26, 27, 28), protested her complete inability to meet the extraordinary security requirements, and asserted her right to access to the federal court without imposition of prohibitive and discriminatory barriers erected by state law which she claimed to be in violation of the "due process of law" and "equal protection of laws" clauses of the United States Constitution.

The plaintiff also showed in her verified complaint, referred to in her petition for rehearing (R. 25), the practical impossibility of securing 5% of the stock of the defendant corporation in view of the fact that the defendant Queensboro Corporation, its officers and affiliated corporations, alone owned or controlled, directly or indirectly, approximately 87% of the stock of Garden Housing Corporation, and it appeared by an affidavit of defendants' counsel (R. 25-26) that—apart from the plaintiff,—the holders of all but five shares of the corporation's stock (approximately 1/10th of 1%), were either defendants or so under the domination and control of the defendants, that they had approved and ratified the wasteful and unlawful sale of corporate assets, thus making it impossible for the plaintiff to meet the 5% requirement of Section 61-b of the General Corporation Law.

Plaintiff, by notice of appeal dated December 22nd, 1947 (R. 13), appealed to the Circuit Court of Appeals, for the Second Circuit, from so much of the aforesaid orders of the District Court as required the giving of $50,000 security and stayed further proceedings on the part of the plaintiff and as denied the aforesaid motion of the plaintiff for modification of the first such order of Judge Inch.

The defendants moved to dismiss the appeal on the ground that the orders appealed from were not final decisions and therefore not appealable, and that an appeal to the Circuit Court to review said orders was unauthorized by law (R. 1). The Circuit Court of Appeals, with-

out opinion, granted defendants' motion and dismissed the appealed by order dated March 23rd, 1948 (R. 23).

The plaintiff thereupon petitioned said Circuit Court for a rehearing (R. 24). Said petition also requested the Circuit Court to certify to the Supreme Court for its instructions under Judicial Code, Section 239 (28 U. S. C. 346 and Rule XXXVII of this Court), four questions relating to the finality, appealability and constitutional validity of the District Court orders (R. 29-30). Said petition (R. 24-35) was denied, without opinion, by order dated the 16th day of April, 1948 (R. 35).

Questions Presented.

1. Whether a state statute (Sections 61-b and 64 of the General Corporation Law of New York), requiring the plaintiff in a stockholder's derivative action, if holding less than 5% of the outstanding shares of any class of such corporation's stock or if holding less than $50,000 in market value thereof, to give security for reasonable expenses, including attorneys' fees, at the instance of the corporation involved, as a condition precedent to proceeding with such suit, must be given effect in a federal court where the jurisdiction of the federal court is based upon diversity of citizenship.

2. Whether such state statute may be given effect in such case in a federal court within the discretion of such court.

3. Whether, even assuming an affirmative answer to either or both of the foregoing questions, the District Court did not abuse its discretion in requiring the security of $50,000 in circumstances

(a) where it is impossible for the plaintiff to secure the joinder, as parties plaintiff, of the holders of 5% of any class of the stock of said corporation;

(b) where the financial resources of the plaintiff render the giving of such security impossible; and

(c) where the primary recovery sought is against a party defendant not entitled, under Section 64 of said statute, to assessment of expenses, being neither a director, officer or employee of the corporation for whose benefit the suit was instituted.

4. Whether said Sections 61-b and 64 of the General Corporation Law of New York, inherently and as applied herein, are not in violation of the "due process of law" and "equal protection of the laws" clauses of Section 1, of Amendment XIV of the Constitution of the United States.

5. Whether the stay by the District Court of all proceedings on the part of the plaintiff, pending the giving of $50,000 security, was not,—in view of the prohibitive amount imposed and the sworn inability of the plaintiff to meet such requirement,—such an effectual and conclusive termination of plaintiff's right to proceed with her cause of action, that said order was, in fact and in law, a final decision, requiring review by the Circuit Court pursuant to Section 128 of the Judicial Code, or, in substance and effect, an injunction requiring review by the Circuit Court pursuant to Section 129 of the Judicial Code.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Reason I. The District Court orders, and the refusal of the Circuit Court to review the same, represent a decision on important questions of federal law which have not been but should be decided by this Court, namely,

(a) the applicability of Sections 61-b and 64 of the General Corporation Law of New York to suits in the federal courts based on diversity of citizenship;

(b) the constitutionality of said state statute, both inherently and as applied in this action, measured against the "due process" and "equal protection" guarantees of the United States Constitution.

Reason II. The Circuit Court of Appeals, by its refusal to entertain the appeal herein, has so far departed from the applicable decisions of this Court, and has sanctioned such a departure therefrom by the District Court, as to warrant the intervention of this Court, in that

(a) access to the federal courts has been denied to a citizen by reason of lack of financial resources to comply with drastic requirements imposed by the Court as a condition precedent to presenting her suit;

(b) the decisions of this Court interpreting the appealability to the Circuit Court of Appeals of orders of the District Court (Judicial Code, Sec. 128) and the right to appeal from injunctions (Judicial Code 129) have not been given effect;

(c) the refusal to modify the order requiring security so as to provide in the alternative for dismissal of the complaint (which would constitute beyond question a final decision) is in conflict with established practice and tends to abridge and circumvent the statutes authorizing appeals from the district courts.

Reason III. There is a compelling necessity for a definitive restatement by this Court, and demarcation of the limits of the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, in order

(a) to assure uniformity of application throughout the federal district and appellate court system in the United States;

(b) to prevent the engrafting of state legislative policies on the procedural jurisprudence of the federal courts;

(c) to give effect to the constitutional authority of the United States Congress alone to legislate with respect to the exercise of the judicial power in courts of the United States, and the authority of this Court to supervise and regulate the practice and procedure of inferior federal tribunals.

Reason IV. The public interest will be promoted by prompt settlement in this Court of the questions involved.

The New York statute involved, applies, by its terms, not only to domestic New York corporations, but also foreign corporations. Thus, as the world center of corporate finance and corporate activity, it affects thousands upon thousands of corporate investors throughout the United States and billions of dollars invested by the American public.

The exculpatory effect of the statute, as a practical protection from judicial scrutiny of the acts of corporate management—good or bad—has encouraged the adoption of similar and even more drastic legislation in other states, particularly in those which compete with each other for revenues from corporate franchises.

The present and continuing spread of such legislation, if unchecked, would eventually require substitution of government agencies as the sole guardians of the investing public. The Securities and Exchange Commission, as presently constituted,—even if authorized by Congress—would be unable to cope with a situation under which the great bulk of the investing public would be required to by-pass the courts for enforcement of their rights by administrative agencies.

It is not only the basic economic and social problems, raised by such legislation, which necessitate prompt settlement in the public interest. Of equal importance is the urgent need for a consistent and uniform treatment of such statutes in the federal courts. It will be shown that the various federal courts have interpreted this and similar statutes in every possibly diverse way—as appli-

cable in federal suits and as not applicable; as mandatory and as discretionary. Such confusion of judicial decision among the federal judges requires an authoritative determination in the interest of certainty and consistency of federal jurisprudence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered 21000, and entitled on its docket, Margaret C. Donovan, Plaintiff-Appellant, against Queensboro Corporation, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased, to the end that this cause may be reviewed both under the aforesaid Section 240-a and Section 262 of the Judicial Code and the rules of this Court as aforesaid, and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said Circuit Court of Appeals refusing to hear the petitioner's appeal from the District Court be reversed by the Court; and that, in accordance with the doctrine and practice of *In the Matter of 620 Church Street Building Corp.*, 299 U. S. 24, this Court reverse the order of the Circuit Court of Appeals and reverse the order of the District Court from which the petitioner's appeal was sought to be taken; and for such further relief as to this Court may seem proper.

Dated, New York City, N. Y., July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. .

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court, dated November 17, 1947, is officially reported at 75 F. Supp. 131 and is printed in this record (R. 4-9).

The Circuit Court of Appeals, in dismissing the appeal and denying the petition for rehearing, rendered no opinion.

Basis for Jurisdiction.

Statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at pages 5, 6 of the foregoing petition, and is, by reference, adopted as part of this brief.

Statutes Involved.

The statute directly involved is Sections 61-b and 64 of the General Corporation Law of the State of New York, and is printed as Appendix hereto (pp. 37 to 40 hereof). Also printed in said Appendix are Sections 20 and 21 of the Stock Corporation Law of the State of New York.

The sections of the United States Constitution involved herein are Amendment XIV, Section 1, Amendment V, and Article III, Sections 1 and 2 which constitutional provisions are printed in Appendix hereto (pp. 43, 44).

Statement.

The material facts are set forth in the summary statement and statement of facts at pages 2 to 6 inclusive of the preceding petition, and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The District Court orders herein and the refusal of the Circuit Court to review the same constitute a decision on important questions of federal law which have not been but should be decided by this Court.

Neither the constitutionality nor the applicability of this statute in the federal courts has been presented to or decided by the United States Supreme Court. The only case known to counsel in which this statute was submitted to this Court for consideration is *The Aspinook Corporation* v. *Bright,* 92 L. Ed., p. 579 (No. 569), 92 L. Ed., p. 580 (No. 347), in which this Court de-

nied certiorari. In that case a stockholder's derivative action had been instituted in the United States District Court, for the Southern District of New York. The defendant, Aspinook Corporation, moved in that court before the late Judge Bright for security in the sum of $90,000 under Sections 61-b and 64 of the New York General Corporation Law. Judge Bright denied the motion without opinion, *sub nom. Thompson* v. *Broadfoot*, 165 F. (2nd) 744, having previously held in *Boyd* v. *Bell*, 64 F. Supp. 22, that the statute was procedural and could not affect the right of the federal district court to proceed in an action where diversity of citizenship had been established. Petitioner, Aspinook, appealed to the Circuit Court of Appeals, Second Circuit, for a writ of mandamus to Judge Bright directing him to vacate the order. The Circuit Court of Appeals denied the petition (165 F. (2nd) 294), two of the Judges holding that the case was not one for application of the extraordinary remedy of mandamus, and one holding that the petition should be denied on the merits by reason of the fact that the state statute was procedural so far as the federal courts are concerned, and that, therefore, there was no obligation to apply it in the federal courts. The Aspinook Corporation petitioned this Court for certiorari pursuant to Judicial Code Section 240 (a) and for a writ of mandamus pursuant to Judicial Code Section 262. The petitions were denied by this Court (92 L. Ed. 579, 92 L. Ed. 580).

The denial by this Court of certiorari in the *Aspinook* case is understandable without minimizing the importance of the question here involved, namely, the constitutionality and application of Section 61-b of the General Corporation Law. In the *Aspinook Corporation* case the District Court had denied the petitioner's application for security. Accordingly, there was no stay of the proceedings and the case could proceed to trial, and the final determination, after trial, would be subject to appellate review by the Circuit Court of Appeals. In view of the fact that the

defendant corporation was the petitioner in the *Aspinook Corporation* case, the important question of public interest would not be so directly presented for review by this Court as in the instant case where the complaining stockholder, who has been in effect denied the right to be heard in the federal court, is the petitioner.

Moreover not only has there been no determination of the important question here involved by this Court, but also the New York State Court of Appeals has made no decision on the constitutionality of Section 61-b. The case of *Shielcrawt* v. *Moffett*, 294 N. Y. 180, had been urged by respondents' counsel below as a determination by the Court of Appeals of the validity of Section 61-b. In that case the Court of Appeals held that the statute was not intended to apply in actions pending at the time that the statute took effect and was careful to point out that it was not passing upon the question of constitutionality of the statute as applied to actions commenced after it became effective. At page 188 of its opinion, the Court said:

> "The Appellate Division granted leave to appeal, certifying to us thirteen questions of law. As the dissenting judges of the Appellate Division point out in their opinion, if the statute is not intended to apply in actions pending at the time that the statute took effect, the *court will not reach the question whether the statute is valid when applied to actions instituted thereafter.*" (Emphasis ours.)

And at page 191:

> "*We conclude that the Legislature has not disclosed an intention that the statute should apply in actions pending when it went into effect. We consider no other question.*" (Emphasis ours.)

The one case commenced after the effective date of Section 61-b which squarely presented the question of con-

stitutionality and in which leave to appeal to the Court of Appeals from the three to two decision of the Appellate Division was allowed, has never been pressed to the Court of Appeals *Baker* v. *MacFadden Publications, Inc.*, 270 App. Div. 440.

The need for such a determination is so urgent that it has been recognized by those who have written upon the subject,

> "• • • owing to the importance of the statute, the issue of constitutionality will be presented repeatedly to the New York courts or to the federal courts sitting in New York until there is a conclusive decision by the Supreme Court of the United States" *Constitutionality of Section 61-b* 54 Yale Law Journal, 352, 357 (1945).

POINT II.

The Circuit Court of Appeals, by its refusal to entertain the appeal herein, has so far departed from the applicable decisions of this Court and has sanctioned such a departure therefrom by the District Court, as to warrant the intervention of this Court.

A. Petitioner has been denied her "day in court" solely by application of a state statute which makes personal wealth a requisite to access to the courts.

The plaintiff showed in the lower Court (R. 17, 20) her complete lack of financial resources sufficient to comply with the security asked by defendants and imposed by the Court, and the impossibility of meeting the alternative requirements of enlisting 5% of the stockholders as parties plaintiff (R. 25-26).

It has always been the rule in derivative actions that a plaintiff need not request a corporation, its officers or directors, to bring an action for waste and mismanagement, when the relief is sought against the persons dominating and controlling the affairs of the corporation.

This is a rule of common sense founded on the premise that the law will not require a futile effort, the success of which is foredoomed. It is more irrational and arbitrary to condition a right to litigate upon the fulfillment of a physically and mathematically impossible joinder of 5% of stockholders as parties plaintiff. In the present case all but one-tenth of 1% of shares, other than plaintiff's, were owned or controlled by parties defendant or persons who had approved and ratified the wrongful acts of the defendants (R. 25-26).

No amount of legal citations or circuitous reasoning can alter the fact that plaintiff—so long as the decision in this case stands—is precluded by lack of money (amounting to a moderate fortune) from having her cause of action heard and determined by the courts.

Under our system of justice, this Court has never sanctioned a practice whereunder possession of wealth has been the price of admission to the federal courts.

In *Gulf, Colorado and Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, this Court said concerning a Texas statute

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification."

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 318, this Court, in the opinion of Chief Justice Hughes, pointed out that the right of a plaintiff to be heard in a stockholder's action in the federal courts is not dependent upon the size of his holdings:

> "While their stockholdings are small, they have a real interest and there is no question but that the

> suit was brought in good faith. If otherwise entitled, they should not be denied the relief which would be accorded to one who owned more shares."

In *Life & Casualty Insurance Co.* v. *McCray,* 291 U. S. 566, this Court refused to hold invalid a state statute relating to allowance of costs and counsel fees to a policyholder bringing suit against an insurance company which had refused to pay a just claim. Six per cent. interest, and costs including a $200 award for counsel fees, had been approved by the state's highest court. In finding such statute to be reasonable and non-discriminatory, Mr. Justice Cardozo, however, stated certain criteria for validity which the New York statute in this case clearly fails to meet. He said, at page 574:

> "It is all 'a question of more or less'. *Sexton* v. *Kessler & Co.,* 225 U. S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open."

It is submitted that the District Court and the Circuit Court of Appeals in the instant case, have completely failed to adhere to the principles established in the foregoing decisions of this Court.

Upon the submission to the District Court of plaintiff's affidavit of inability to furnish anything but nominal security, there was also submitted the affidavit of one of plaintiff's counsel setting out his beneficial interest therein, legal title having been vested in plaintiff (R. 22) since December 1, 1942, nearly 4½ years before the commencement of this action (R. 6). Defendants, upon their motion in the Circuit Court of Appeals for the dismissal of the appeal, having failed to bring up any of the papers from the Court below except the opinion and order, the affidavit of the plaintiff showing inability to furnish security (R. 20-21) and the affidavit above referred to

(R. 22) were submitted to the Circuit Court of Appeals as a part of plaintiff's opposing affidavit. It is submitted that the fact that the plaintiff is the holder of the legal title only, does not deprive her of her right to set up her inability to provide the security. As to any owner, legal or equitable, the imposition of the $50,000 security and the staying of all proceedings, was a final order dismissing the complaint in reality though not in form, because the requirement of any security was completely unauthorized under the federal rules and procedure and was in violation of petitioner's constitutional rights to have her case heard and decided without complying with such alien requirements.

B. The decisions of this Court, interpreting the appealability of orders of the District Court and the right of appeal from injunctions, have not been given effect.

The petitioner's appeal to the Circuit Court was dismissed because the order appealed from was not considered a final decision within the meaning of Judicial Code, Section 128. In view of the conclusive effect of the order in forever barring any practical possibility of plaintiff's proceeding with her cause, it is clear that the Court did not give effect to the decisions of this Court making substance, rather than form, the basis of finality. Thus in *Cobbledick* v. *United States*, 309 U. S. 323, wherein the District Court denied a motion to quash subpoenas, and from the denial of said motions petitioner's appeal to the Circuit Court had been dismissed for lack of jurisdiction, this Court, after granting certiorari, said at page 328 (referring to the decision of this Court in *Perlman* v. *United States*, 247 U. S. 7):

> "To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his con-

> stitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes."

So also in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188, at page 191, this Court stated:

> "As in the *Enelow* case, so here, the result of the District Court's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action."

Similarly in the instant case, it is a matter of record (R. 17, 19, 28) that the effect of the imposition of the $50,000 security requirement is a practical and effective termination of the law suit without opportunity on plaintiff's part to have been heard on the merits of her case.

While there seems to be no doubt that, in view of the conclusive practical effect of the District Court order, such order should have been held appealable under Judicial Code, Section 128, there was also ample authority for the Circuit Court of Appeals to entertain the appeal under the provisions of Judicial Code, Section 129. It is the contention of the petitioner that the permanent stay contained in the District Court order constitutes an injunction appealable under Judicial Code, Section 129. This Court has so determined in the case of *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

Thereafter, in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188, substantially the same question had arisen, except that the prosecution of the action had been enjoined by the District Court in order that an issue raised by a counterclaim might be first heard and disposed of. Also since the date of the *Enelow* case *supra*, the Federal Rules of Civil Procedure had been adopted. An appeal to the Circuit Court from the Dis-

trict Court order was taken and the Circuit Court certified to this Court certain questions for determination. The decision of this Court by Mr. Justice Roberts, said (pp. 191-192):

> "The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure, our decision in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, would require an affirmative answer to the question.
>
> The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree."

It is submitted that the Circuit Court, in failing to hear the appeal under authority contained in Section 129 of the Judicial Code, has departed from the principles established by this Court in the foregoing cases.

C. The refusal of the District Court to modify the order requiring security so as to provide in the alternative for the dismissal of the complaint, is in conflict with the established judicial practice and tends to abridge and circumvent the statutes authorizing appeals from the District Courts.

If the order had been modified as requested by petitioner so as to provide a time limit within which the security should be deposited or the appeal dismissed, then upon the failure to deposit within such time, the

finality of the order would have been beyond dispute on the question of plaintiff's right to appeal to the Circuit Court of Appeals. However, this reasonable modification of the order was refused. Judge Inch's opinion denying plaintiff's motion to modify, indicates that he had signed the form of order submitted by the plaintiff as he "felt she could object to the amount of security fixed by me". He then stated "Anything else, such as a new motion to dismiss must wait a motion by defendant if and when made" (R. 3).

This, of course, does not afford any sufficient reason for refusing the requested modification. The statement of Judge Inch—following the filing with him of an affidavit by petitioner (plaintiff) of inability to furnish any security other than the usual maximum security for costs in the sum of $250 (R. 20-21)—that he expected an application for reduction of the amount of security appears to be an afterthought, as his opinion issued upon the granting of the motion for the exact amount of security sought by the defendants expressly stated his finding, that the said sum of $50,000 was "not excessive or unreasonable".

POINT III.

The application by the lower courts of the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, in support of the enforcement of Section 61-b and similar statutes in the federal courts, requires a determination by this Court of the extent to which such rule shall affect procedural and eligibility requirements in the federal courts.

In the instant case the District Court, in its opinion, relied in large part upon statements made in the opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, and respondents in their briefs similarly relied upon the decision of this Court in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99 as cases holding, respectively,

for application of the doctrine to state statutes regulating deficiency judgments and state statutes of limitations. From the decision below there would seem to be a tendency on the part of the District Court, with the full acquiescence of the Circuit Court of Appeals, to extend the doctrine of *Erie R. R. Co.* v. *Tompkins* beyond the applicable limits defined by this Court. There is nothing, however, in that case or in *Angel* v. *Bullington*, or in *Guaranty Trust Company* v. *York* (*supra*) which would authorize the District Court to apply procedural state statutes which would in effect deny right of access to the federal courts.

It is submitted that the doctrine of the *Erie Railroad* case and cases following it, have not abrogated the rule laid down in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, wherein it was stated:

> "A remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute. Neither can it be so narrowed."

Certainly neither the decision of this Court in *Angel* v. *Bullington* or *Guaranty Trust Company* v. *York* (*supra*), can be said to support the action taken by the lower court in this case. In *Angel* v. *Bullington* the state statute provided certain machinery for the enforcement of a claim on a deficiency judgment, seeking by such legislation to prevent the inequitable situation where there might otherwise be two recoveries for the same indebtedness. The United States courts may logically be said to be bound by such state legislation, upon which the *existence* of a litigant's claim depends. If by application of the state law there was no valid claim to be enforced, obviously a claim could not be created merely by proceeding in the federal court. Similarly, in *Guaranty Trust Company* v. *York* (*supra*), the essential holding of this Court is to the effect that the time for the enforce-

ment of the claim having expired by state law, such state law should not be ignored in the federal court for the purpose of *reviving or recreating the expired claim.*

In addition, the line of cases headed by *Sioux County* v. *National Surety Co.*, 276 U. S. 238, relied upon by respondents, are in no way determinative of the question here involved. In that case a Nebraska statute was under consideration which required the allowance of an attorney's fee in case of judgment against the Surety Company on a bond written by it. The application of such a state statute in the federal court is clearly distinguishable as a substantive right rather than a procedural right afforded under state law. In other words, the Nebraska statute related only to the *amount* which the plaintiff might claim and recover by judgment. It did not affect the rights of the litigant of access to, or to be heard in, the federal court.

Under Article III, Sections 1 and 2 of the United States Constitution, the judicial power of the United States, including cases based upon diversity of citzenship, is vested in the Supreme Court and such inferior courts as Congress may establish. The encroachment upon the federal judicial power by such a state statute as here under consideration, is evident, since the practical effect of its application is to deny a litigant by said rules a right to be heard in the federal court. Authoritative decisions of this Court stand for the proposition that no such requirement can be allowed to affect the proceedings or procedure of the United States courts. Thus in *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U. S. 459, at page 470, it was said:

> "The question is then, was the court below right in holding that it had the power because the Kansas statute so authorized to assess as against one party to a suit in the Supreme Court of the United States

a sum for attorneys' fees for services rendered in that court as against another party to the suit although such assessment, as we have seen, was not authorized by the law of the United States but was in conflict with the settled rule in the Supreme Court of the United States? It seems superfluous to put the question since its very statement conveys of necessity a negative answer. For how on the face of the question, consistently with the most elementary principles of our constitutional system of government can it be possibly assumed that a state statute could be made operative in the Supreme Court of the United States to the disregard of its settled rule of procedure and of the principles which had guided its conduct from the beginning, directly sustained by express rule adopted under the sanction of Congress?"

And again in *Harrison, Secretary of State of Oklahoma* v. *St. Louis & San Francisco Railroad Company,* 232 U. S. 318, at page 328 it was said:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests and the lines which define it are so broad and so obvious that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

And yet we find—despite the care which this Court has taken in defining the limits of the doctrine of *Erie R. R. Co.* v. *Tompkins* and in stating the principles covering the judicial power of the United States and the exclusive right of this Court to regulate and make rules of procedure for the federal courts—that the federal district court has adopted in this case rules of procedure not authorized by rules of this Court or any laws of the United States but admittedly rules of local or state origin.

In his opinion District Court Judge Inch specifically referred to the rule adopted by the judges of the Federal District Court as follows (R. 8):

> "Moreover, Rule 45 of this Federal District Court provides that, 'whenever a procedural question arises which is not covered by the provision of any statute of the United States or of the Federal Rules of Civil Procedure * * * the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied.'"

This, we submit, is at best a dangerous practice, and if followed throughout the numerous federal districts, would result in the very confusion in federal practice, the avoidance of which was sought by adoption by this Court of the Federal Rules of Civil Procedure.

In fact, the District Court herein not only applied local state rules of procedure, but ignored Rule 23 of the Federal Rules of Civil Procedure, which Rule, particularly subdivision (c) thereof, eliminates in the federal court the claimed evil—secret settlements—to meet which Section 61-b of the New York General Corporation Law was avowedly enacted. See "The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law," 54 Yale Law Journal, p. 367, footnote 62, referring to the Memorandum of Governor Thomas E. Dewey. (See also reference to Governor's

Memorandum on approving 61-b, quoted at 22 McKinney's Consolidated Laws of New York, General Corporation Law, Section 61-b; 1947 Cumulative Supplement at page 70.) Rule 23(c) prohibits a dismissal or compromise of a class action without the approval of the Court and requires that notice of any proposed dismissal or compromise be given to all members of the class (here stockholders) in such manner as the Court may direct. This rule thus effectively meets the problem of so-called "strike suits" by banning secret settlements.

POINT IV.

The public interest will be promoted by prompt settlement in this case of the questions involved.

In order properly to comprehend the tremendous significance of this and similar statutes upon the thousands of corporate investors in the United States and upon the regulation of corporate management, it is necessary to make some reference to the factual background and circumstances under which this legislation was enacted. In a thorough analysis by Sergei S. Zlinkoff of the statute, appearing in 54 Yale Law Journal, 352, entitled "The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law", the author summarized the factual background surrounding the enactment of this statute, saying, at page 359:

> "Section 61-b did not originate with the Law Revision Commission or the Judicial Council of the State of New York, and, indeed, their opinion was not even requested. Nor was the statute one proposed by any bar association. Admittedly it is identical, except in one respect, with one recommended by the New York Chamber of Commerce, and it was introduced in the state legislature simultaneously with the public release of the Chamber's proposed act and Report of

its Special Committee on Corporate Litigation, dealing with stockholder suits and issued after a privately conducted study of more than a year.

No hearings of any character were conducted by the legislature, and it was hurriedly passed in the closing days of the legislative session with the scantiest of debate. Every bar group that had an opportunity to express an opinion about the Act before its signature by the Governor, including the Committee on State Legislation of the New York County Lawyers Association, the Federal Bar Association of New York, New Jersey and Connecticut, and the Law Reform Committee of the New York City Chapter of the National Lawyers Guild, condemned the statute as undesirable. Strong objection to the legislation was made by the non-partisan Citizens Union of New York City and by the American Investors Union, a non-profit organization devoted to the protection of the interests of the American investor, and both the AFL and CIO issued statements expressing disapproval. Many of these groups joined numerous individuals in requesting the legislature and the governor of New York to hold hearings before enacting the measure into law, but none was held.

Thus Section 61-b was enacted without the legislative or gubernatorial investigation into the facts that has so often led the Supreme Court of the United States to sustain statutes as a presumptively reasonable exercise of legislative power."

Reference is also made to the leading article in Columbia Law Review, Vol. 47, Jan. 1947, No. 1, entitled "New Aspects of Stockholders' Derivative Suits" by George T. Hornstein, in which it is said, on page 2 thereof:

"State legislation has been largely influenced by 'special interests'. In New York, for example, a powerful body, among whom were individuals actu-

> ally defendants in pending cases charging them with corporate wrongs, found it relatively easy to procure state laws 'killing off' stockholders' suits—heretofore the most effective, albeit inadequate, method of keeping directors in line. This group rushed through the New York Legislature an amendment to the General Corporation Law, a new Subdivision b to Section 61, and persuaded the Governor to sign it without a public hearing and despite the criticism of many bar associations. The present writer immediately recognized the legislation as 'the death knell of stockholders' derivative suits in New York', unless relief should come from either the state courts holding the legislation unconstitutional or the federal courts ruling that the legislation is procedural and therefore not binding upon them."

See also Hornstein Rights of Stockholders in the New York Courts, Yale Law Journal, Vol. 56, No. 6.

The impact of such statutes upon the public interest is more clearly demonstrated by the far-reaching effect of such statutes. In the above quoted article, 54 Yale Law Journal, 352, at page 367 the author states:

> "Does Section 61-b concern only the 'strike suit' plaintiff or will any substantial number of stockholders in American corporations be affected by its terms? The simple answer to this fundamental question appears to be that the act will unquestionably affect the rights of an overwhelming majority of stockholders who seek to maintain derivative suits in New York."

After analyzing a study prepared for the Temporary National Economic Committee by the Securities & Exchange Commission, showing the distribution of shareholdings in 1710 corporations with securities listed on a

national exchange, he draws the following well-founded conclusion at page 368:

> "These facts, therefore, seem to establish that Section 61-b, in so far as it requires the plaintiff-stockholder's shares to have a market value of $50,000 or more before he can maintain a derivative action, will operate as a practical matter to deprive an estimated 96% of all shareholders in American corporations of their right to maintain derivative actions in New York. It may even take this right from as many as 98% of the shareholders since it seems likely that of the 4% of shareholdings valued in excess of $10,000, not more than half have a value in excess of $50,000. It should be evident from these figures that only the smallest minority of shareholders will be able to meet the requirement of Section 61-b that the plaintiff's shareholdings have a value of $50,000 or more."

It might be added as a corollary to the above statement that, of the possible 2 to 4% of American stockholders who could qualify to bring a derivative stockholder's action, undoubtedly the great bulk of such shareholders would be found, by reason of their larger holdings, to be connected with the management of the corporation as officers or directors.

Since the statute applies, by its terms, not only to domestic New York corporations, but also to foreign corporations, it can readily be seen that the statute of the State of New York, which state is the world center of commercial and corporate activity, must have an effect upon countless corporations and shareholders thereof not domiciled in New York State. However, even this does not represent the full significance of this legislation upon the public interest and public economy.

Substantially similar legislation has been enacted in a number of other states. See Stockholders' Derivative Suits, 47 Col. Law Rev., page 1, at page 7 (footnote 36).

Among the states which have aped this drastic legislation, and in fact in some cases have gone even further, are the states of New Jersey, Delaware, Pennsylvania, Maryland and Wisconsin. It is significant to note that most of the states following this course are those which compete for the revenues obtainable from corporate franchises. It is well-known that some states have sought to attract corporations by inducements contained in liberal corporation laws, particularly in so far as such laws regulate management. In order to retain preeminence, the competing states have already indicated their willingness to go even further than the New York statute in imposing barriers to judicial scrutiny of the acts of management. See 47 Col. Law Review 1, at page 10, where the author states:

> "Following promptly in the wake of the original New York legislation, a number of other states, notably Delaware, New Jersey and Wisconsin, adopted legislation similar to Section 27-a (contractual only and without any provision for judicial supervision). A unique law passed the Kentucky legislature: it provide for repaying to the director not only his expenses, but 'any amount paid in compromise.' Can one imagine a more warped conception of fiduciary responsibility?"

If such legislative statutes not only remain unimpeached but follow the inevitable tendency of reproduction by other state legislatures, it is clear that the rights of stockholders formerly enforced through the courts can only be preserved by the setting up of some new tremendous arm of the federal executive branch. It will be conceded that, with all the burdens of supervision and control already placed upon the Securities & Exchange Commission, the further obligation of detailed supervision of all acts of corporate management would not only be impossible for that body to handle, but undesirable for several reasons. Among these reasons may be mentioned the cost of such administrative program, the natural aversion to further

federal control of state matters, and the antipathy toward substitution of administrative process for the traditional method of settling private, civil grievances through the courts established for such purposes.

A further important reason for prompt determination of the questions here involved by this Court is the confused status of decisions of the federal judges interpreting this and similar state statutes; for example, in *Boyd* v. *Bell*, 64 F. Supp. 22, the late Judge Bright, in refusing to apply Section 61-b, held that the statute was procedural and could not affect the federal courts' right to proceed with the same. He similarly denied, without opinion, a motion made under 61-b in *Thompson* v. *Broadfoot* (*The Aspinook Corporation*), 165 F. 2d 744.

In *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, Judge Leibell denied the application made under 61-b, apparently being of the opinion that its application in the federal court was unnecessary and undesirable.

In the instant case Judge Inch was of the opinion that the statute compelled him to exercise the judicial discretion of the federal judge (R. 8).

In *Cohen* v. *Beneficial Industrial Loan Corporation*, 7 Fed. Rules Decisions 353, Judge Smith, in the New Jersey District Court, held under a similar New Jersey statute, that the statute was remedial in its nature and not substantive and, therefore, not to be enforced by the federal court.

This is indeed but the beginning of the confusion and chaos which may be expected throughout the federal district court system in the interpretation and construction of the provisions of this statute, as well as similar statutes of other states. A decision by this Court will be the only means of eliminating such confusion and establishing consistency and uniformity in the treatment of such questions by the federal courts.

In fact, the Advisory Committee on the Rules for Civil Procedure has emphatically pointed out the need for a determination by this Court of the problem raised by the New York Statute. In its Report of Proposed Amendments of Rules of Civil Procedure for the District Courts of the United States, 5 Federal Rules Decisions 433, submitted to this Court under date of June 1946, the Advisory Committee expressed its opinion that the problem should be disposed of by judicial decision of this Court in a litigated case, rather than by "ex parte" amendment of existing Rule 23 of the Federal Rules of Civil Procedure. This Report stated at page 451 of F. R. D.:

> "As to actions instituted after the effective date of the legislation, the constitutionality of Sec. 61-b is in dispute. See *Wolf* v. *Atkinson* (Sup. Ct. 182 Misc. 675 (Constitutional)); *Citron* v. *Mangel Stores Corp.*, Sup. Ct. 50 N. Y. Supp. 2d 416 (unconstitutional); Zlinkoff: The American Investor and the Constitutionality of Sec. 61-b of the New York General Corporation Law, 54 Yale L. J. 352.
>
> * * * *
>
> The decisions here discussed show that the question is a debatable one, that there is respectable authority for either view, with a recent trend toward the view that Rule 23(b) (1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.
>
> The Advisory Committee is unanimously of the opinion that this course should be followed."

The New York statute, Section 61-b General Corporation Law, would, even in the state courts be wholly in-

effective if other sections of the same law following it, did not authorize the court, after trial, to allow expenses, including counsel fees, to successful defendants (payable out of the security supplied by the plaintiff). But such allowance after a trial in a federal district court seems to be contrary to the federal statute. 28 U. S. C. Section 571 reads in its first sentence:

> "The following fees and no others shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States and to district attorneys except in cases otherwise expressly provided by law."

The fees allowed are listed in the next Section 572, being limited mainly to relatively small docket fees.

There would seem to be no doubt of the power of Congress to enact said Sections 571 and 572. How then can the New York section, 61-b, be enforced in any case in a federal court to the abrogation of said valid federal statutes?

POINT V.

It is respectfully requested that this Court, in due course, finally determine this question and dispose of this controversy by reversing the failure of the Circuit Court of Appeals to hear the appeal and reversing and setting aside the order of the District Court as being without authority in law.

An almost exact precedent for the action of this Court requested by the petitioner, is found in the case of *In the Matter of 620 Church Street Building Corp.*, 299 U. S. 24, in which the following circumstances appeared: At a time when permission to appeal was required application was made to the Circuit Court of Appeals in a proceeding under Section 77B of the Bankruptcy Act, following a con-

firmation by the District Court of the plan of reorganization. The Circuit Court of Appeals denied leave to appeal. This Court determined specifically that the action of the Circuit Court of Appeals in declining jurisdiction could

> "properly be reviewed upon a writ of certiorari under the general power conferred by Judicial Code, §262, 28 U. S. C. 377. That provision contemplates the employment of this writ in instances not covered by §240 of the Judicial Code (28 U. S. C. 347) and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways'. Citing cases *United States* v. *Beatty*, 232 U. S. 463, 467; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 380; *In re Chetwood*, 165 U. S. 443, 461, 462; *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 162."

Although this Court found that the Circuit Court of Appeals did not in that instance abuse its discretion in declining to allow an appeal, this Court examined the entire question and reached the conclusion that there was no substance to petitioner's claim which was barred by findings of fact which were conclusive on the Circuit Court of Appeals.

In the case at bar the primary question involved is concerned with the enforcement in the federal court of a state statute imposing an arbitrary qualification on the otherwise free right in the federal court to institute and carry forward an equity action for relief.

It is, therefore, requested that this Court shall finally dispose of the immediate controversy by holding that the order of the District Court based on the state statute is without validity and must be set aside.

See also:

United States Alkali Export Association, Inc. v. *United States*, 325 U. S. 196;
DeBeers Consolidated Mines, Inc. v. *United States*, 325 U. S. 212.

CONCLUSION.

A writ of certiorari as prayed for in the Petition should issue.

Respectfully submitted,

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APPENDIX.

State Statutes.

The state statute is Section 61-b of the New York General Corporation Law, being Section 61-b, Article 6, of Chapter 23 of the Consolidated Laws of New York, added by Chapter 668 of the Laws of 1944 and amended by Chapter 869 of the Laws of 1945 (22 McKinney's Consolidated Laws of New New York, Annotated, Sec. 61-b). The statute here cited is as follows:

> "In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five per centum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

The statute above quoted refers to "section sixty-four of this chapter". That reference is to Section 64 of the New York General Corporation Law, being Section 64,

Article 6-A, of Chapter 23 of the Consolidated Laws of New York, added by Chapter 869 of the Laws of 1945 and derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Sec. 64). The statute here cited is as follows:

> "Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

The statute above quoted refers to "section sixty-five, sixty-six and sixty-seven of this chapter" and to "section sixty-eight of this chapter". Those references are to Sections 65-68, both inclusive, of the New York General Corporation Law, being Sections 65-68, both inclusive, Article 6-A, Chapter 23 of the Consolidated Laws of New York, all added by Chapter 869 of the Laws of 1945, Sections 65-67, being derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Secs. 65-68). The statutes here cited are as follows:

> "65. Application for payment of expenses under

the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, or for assessment of expenses pursuant to section sixty-four of this chapter, may be made either (a) in the action, suit, or proceeding brought in this state in which such expenses were incurred or (b) to the supreme court in a separate proceeding. Such application shall show the disposition of any previous application made to any court. If not made in the action, suit or proceeding in which the expenses were incurred, such application shall also show reasonable cause for failure to make application in such action, suit or proceeding.

"66. An application pursuant to section sixty-five of this chapter shall be made in such manner and form as may be required by applicable rules of court or in the absence thereof by direction of the court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to such other persons as it may designate in such manner as it may require.

"67. If after hearing an application for payment or for assessment of expenses, the court shall find that the applicant, his testator or intestate was successful in whole or in part, or that the action against him has been settled with the approval of the court, the court shall grant such application in such amount as it shall find to be reasonable, and shall make an order directing the corporation to pay to the applicant the amount awarded; provided, however, that no award of indemnity or assessment of expenses shall be made in any case where it shall appear (i) that the law of the state of incorporation of the corporation prohibits such indemnity or assessment; or (ii) that the award would be inconsistent with any action of the stockholders or members of the cor-

poration taken prior to and in effect at the time of the accrual of the alleged cause of action; or (iii) if there has been a settlement approved by the court, that the award would be inconsistent with any condition with respect to payment of indemnity or assessment of expenses expressly imposed by the court in approving such settlement.

"68. Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:

"(a) when the corporation against whom the application is made for assessment of expenses pursuant to section sixty-four or for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, is a domestic corporation or a corporation doing business in this state;

"(b) when such expenses were incurred in an action or proceeding maintained in a court in this state;

"(c) when the application is made by a resident of this state and the director, officer or employee was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred."

Section 61-a of the New York General Corporation Law hereinabove referred to was repealed by Chapter 869 of the Laws of 1945.

Other state statutes referred to in this brief are Sections 20 and 21 of the Stock Corporation Law of New York (28 McKinney's Consolidated Laws). The statutes here cited are as follows:

"§20. Voluntary sale of franchise and property and rights of objecting stockholders.

A stock corporation, except a railroad corporation

and except as otherwise provided by law, with the consent of the holders of record of two-thirds of its outstanding shares entitled to vote thereon may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof; but franchises within the state may be sold only to a domestic corporation. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called pursuant to section forty-five. Any stockholder not voting in favor of such proposed sale and conveyance may at any time prior to the vote thereon—or if notice of the meeting was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such sale and conveyance and demand payment for his stock, and thereupon such stockholder or the corporation shall have the right, subject to the conditions and provisions of section twenty-one, to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and filed with the corporation. As amended L. 1934, c. 764, §2, eff. May 19, 1934.

§21. Determination of value of stock of objecting stockholder.

In the event that the stockholders of a corporation have taken action pursuant to sections fourteen, twenty, thirty-six, eighty-five, eighty-six or ninety-one and if any stockholder has objected to such action and demanded payment for his stock as provided in section fourteen, section twenty, subdivision nine of section thirty-eight, subdivision seven of section eighty-five, section eighty-seven or section ninety-one, either such stockholder or the corporation may apply upon eight days' notice to the other, within sixty days after such demand, to the supreme court

at any special term thereof held in the judicial district in which the office of such corporation is situated, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper. The court may at the time of appointing the appraisers or at any subsequent time direct such stockholder to submit his stock certificate to the clerk of the court for notation thereon of the pendency of the appraisal proceedings, and if such stockholder fails to comply with such direction the court may on motion of the corporation dismiss the proceeding. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and after being duly sworn honestly and faithfully to discharge their duties, they or any two of them shall estimate and certify the value of such stock just prior to the taking of the action to which the objection is made and deliver one copy of their appraisal to such corporation, and another to such stockholder if demanded by him. Either the stockholder or the corporation may apply to the supreme court upon five days' notice for an order confirming or modifying or rejecting the appraisal. If the court confirms or modifies such appraisal it shall award interest on the value of such stock, as determined by such appraisal and as confirmed or modified by the court, from the date of taking the action to which the objection was made, and shall direct the manner in which payment shall be made to such stockholder. Before receiving payment such stockholder shall surrender to the corporation his certificate of stock. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stock-

holder shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation. The fees and expenses of the appraisers shall be fixed by the court and paid by the corporation. As amended L. 1924, c. 441, §6; L. 1934 c. 764, §3, L. 1936, c. 213 §1; L. 1936 c. 778, §4; L. 1939 c. 183 eff. April 1, 1939."

Federal Statutes.

A pertinent federal statute is the Enabling Act of 1934 authorizing the promulgation of Federal Rules of Civil Procedure (48 Stat. 1064, 28 U. S. C., Sec. 723-b), which is, in part, as follows:

> "The Supreme Court of the United States shall have power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Federal Constitutional Provisions.

The following provisions of the Constitution of the United States are or may be pertinent:

> *Article III, Section 1.* "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. * * *"
>
> Section 2. "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties

made * * * under their authority, * * * to controversies * * * between citizens of different states * * *."

"Amendment V. No person shall be * * * deprived of life, liberty or property without due process of law;"

"Amendment XIV—Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitutional Provisions.

The following provisions of the Constitution of the State of New York are or may be pertinent:

Article I—Section 6: "No person shall be deprived of life, liberty or property without due process of law."

Article I—Section 11: "No persons shall be denied the equal protection of the laws of this state or any subdivision thereof."

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Supreme Court of the United States

October Term—1948

No. 156
No. 49 Miscellaneous

Margaret C. Donovan,

Petitioner,

against

Queensboro Corporation, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCH PETITION

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The plaintiff has not availed herself of the provisions which she herself caused to be inserted therein, whereby there was reserved to her the right to "obtain the modification or vacation" of the order through the presentation of further matter of fact or of law or of argument; and she has not availed herself of the invitation of the District Court to present objection to the amount of the security fixed by it 6

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Supreme Court of the United States

October Term—1948

Nos. 156, 49 Miscellaneous

Margaret C. Donovan,

Petitioner,

against

Queensboro Corporation, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCH PETITION

Statement of Facts

This action by the petitioner as plaintiff was brought in the United States District Court for the Eastern District of New York, allegedly in a derivative right as the holder of a voting trust certificate for 111½ shares (2.35%) of the outstanding capital stock of the defendant, Garden Housing Corporation. She demanded a receiver and an accounting (R. p. 2).

On October 10, 1947, the defendant moved to dismiss the amended complaint and, in the alternative, that the plaintiff be required, under Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which might be incurred by that corporation and by the other parties-defendant in connection with the action, and that, pending the deposit of such security, further proceedings on the plaintiff's part be stayed (R. p. 2).

On November 17, 1947, the Court (Judge Inch) delivered an opinion denying the motion to dismiss but granting the alternative prayer for security in the sum of $50,000 (R. p. 4).

On November 24, 1947, the Court entered on this decision an order, the directing portions of which read as follows (R. pp. 9-11):

> "Ordered, that the motions by the defendants to dismiss the complaint be and the same hereby are denied; and it is further
>
> Ordered, that the motion by the defendants for security be and the same hereby is granted, and the plaintiff be and she hereby is required, pursuant to the provisions of Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant Garden Housing Corporation security satisfactory to this Court in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which may be incurred by said Garden Housing Corporation and by the other parties defendant in connection with this action, for which said Garden Housing Corporation may become subject; and it is further
>
> Ordered, that pending the deposit of the security as aforesaid all further proceedings on the part of the

plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed; and it is further

Ordered, that the time for the defendants to move to or answer the amended complaint herein be and the same hereby is extended 20 days after the deposit of the aforesaid security by the plaintiff with notice to the defendants." (The italics are ours.)

The words italicized were inserted at the request of plaintiff's counsel on the settlement of the order, because, as said by Judge Inch, "I felt she could object to the amount of security fixed by me" (R. pp. 3, 16).

On November 28, 1947, the plaintiff's attorneys moved to add to this order a provision that, in the event the required security were not given within ten days, the amended complaint be dismissed (R. p. 3).

This motion was denied by the Court with the following memorandum (R. p. 3):

"Dec. 12, 1947
This motion is denied.
I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me. That was all before the Court as I had denied the motion to dismiss the complaint on the grounds urged by the defendant and ordered security to be furnished. Anything else, such as a new motion to dismiss must await a motion by defendant if and when made.

Robert A. Inch."

The order of denial was dated December 19, 1947 (R. pp. 3, 11).

On December 24, 1947, the plaintiff served a notice of appeal to the Circuit Court of Appeals for the Second Circuit from the aforesaid order of November 24, 1947, and from the aforesaid order of December 19, 1947 (R. p. 13).

The defendants thereupon moved in the Circuit Court of Appeals to dismiss the appeal "because the orders sought to be reviewed are not final decisions and are not appealable" (R. pp. 1-4). In March 23, 1948, this motion was unanimously granted, without opinion (R. p. 23).

Subsequently, the plaintiff petitioned the Circuit Court of Appeals for a rehearing or, in the alternative, for a certification of alleged questions to this Court (R. pp. 24, 29). This petition was denied, without opinion, by order entered April 16, 1948 (R. p. 35).

The plaintiff now petitions for a writ of certiorari to the Circuit Court of Appeals or, in the alternative, for a writ under Section 262 of the Judicial Code.

POINT I

The petition and motion are without foundation or merit. Basically, they seek a review of the District Court's order of November 24, 1947; but the record on which such order was made is not presented here.

The only record presented to this Court is the record of the following proceedings in the Circuit Court of Appeals:

1. Notice of motion and affidavit to dismiss the appeal;
2. Affidavit in opposition;
3. Order dismissing the appeal;
4. Petition for rehearing and certification of questions;
5. Order denying such petition.

The District Court's order of November 24, 1947, is in the record solely as Exhibit "B" attached to the defendants' motion for dismissal in the Circuit Court of Appeals. That order recites, as the record on which it was based, the amended complaint, the notices of motion to dismiss the amended complaint, the affidavit of Charles H. Tuttle in support of such motion, various exhibits attached thereto, and the affidavits of Edward F. Clark and Margaret C. Donovan in opposition.

None of these papers is in the record now presented to this Court.

On this record, the only subject admissible for any possibility of consideration is the decision of the Circuit Court of Appeals dismissing the appeal.

The refusal of the Circuit Court of Appeals to grant a rehearing or certify questions was purely discretionary and presents nothing for consideration by this Court.

POINT II

Furthermore, the plaintiff presents no case within the settled rules for the issuance of a writ of certiorari.

The order of November 24, 1947, was not final, and, at the plaintiff's own request, was made merely tentative.

The plaintiff has not availed herself of the provisions which she herself caused to be inserted therein, whereby there was reserved to her the right to "obtain the modification or vacation" of the order through the presentation of further matter of fact or of law or of argument; and she has not availed herself of the invitation of the District Court to present objection to the amount of the security fixed by it.

(1) As set forth above in the Statement of Facts, the District Court, in settling its order of November 24, 1947, accepted the counter-form proposed by the plaintiff's counsel who successfully urged that there should be included in the directive portion the following words which we italicize (R. pp. 3, 16):

> "ORDERED, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed."

The plaintiff has never availed herself of this saving clause sought and obtained by her for her own relief and benefit. In asking for it, she impliedly represented her intention to use it. The fact, however, is that she has never presented to the District Court an application for

a reconsideration or new matter of fact or of law or of argument for the modification or vacation of the security thus ordered only tentatively.

She did, on November 28, 1947, move the District Court for the addition of a further provision that, in the event that the security be not furnished within ten days, the amended complaint be automatically dismissed. This motion was denied (R. p. 3). The granting of it would have enabled the plaintiff to achieve automatically the very dismissal which she herself had opposed and the Court had refused by the simple stratagem of not complying within ten days with the requirement for security. In denying this motion, the District Court said (R. p. 3):

> "I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me."

(2) In the second place, notwithstanding this express invitation by the District Court, the plaintiff once again deliberately omitted to avail herself of the opportunity for relief thus held open to her a second time by the District Court,—and this notwithstanding that in their affidavit in opposition to the motion to dismiss their ensuing appeal, the plaintiff's counsel acknowledged that they recognized that this invitation by the District Court was "an intimation" of a "possible reconsideration of the amount of security" (R. pp. 17, 18).

(3) For these several reasons, the order of November 24, 1947, was in no sense final even as a temporary determination. It was merely tentative, and was twice expressly held open by the District Court for reconsideration by it on motion of the plaintiff.

In consequence, the Circuit Court of Appeals had, in no event, jurisdiction to entertain an appeal therefrom while these remedies and opportunities were still available to the plaintiff in the District Court.

Like considerations are now applicable in this Court.

(4) Parenthetically, it is noteworthy that the plaintiff's attorneys are, admittedly, themselves the real parties in interest,—"the beneficial owners" of the trust certificate (R. pp. 16, 17, 22).

The plaintiff states that she is not able to furnish the security (R. p. 17); but there is no such statement by her attorneys,—the real parties in interest (R. p. 22). They merely say that they are unwilling to "wager" such a sum "on the outcome of the suit" (R. p. 22). But they are perfectly willing to force the defendant corporation (Garden Housing Corporation) to "wager" such a sum through the operation of Sections 61(b) and 64 of the General Corporation Law of the State of New York; although they are unwilling to give it any security as against such enforced "wager".

POINT III

Furthermore, and irrespective of the foregoing, the order of November 24, 1947, was a mere stay in the course and conduct of the action which consists of a single cause of action in equity.

It affected that action only, and was conditioned exclusively on an act to be performed within that action. It related to no suit, proceeding, act or event outside of the action itself. It concerned merely security for costs.

(1) The appellate jurisdiction of the Circuit Court of Appeals is limited to "final decisions" and to injunctions and receiverships. (Sections 128 and 129 of the Judicial Code.)

The order of November 24, 1947, was not a "final decision." (*Catlin* v. *United States*, 324 U. S. 229, 233). Nor was it an "injunction" within the meaning of Section 129 of the Judicial Code.

It was merely a temporary stay tentatively imposed by the District Court as part of its control over the cause pending before it. It related only to the course of the action itself. It was not a stay conditioned upon conduct or events outside the suit itself. It concerned merely security for costs in the suit.

No case has ever held that a mere stay pending the furnishing of security for costs was either "a final decision" or "an injunction" within the meaning of Sections 128 and 129 of the Judicial Code.

(2) Plaintiff's counsel emphasize *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188.

In that case, the defendant insurance company filed a counterclaim or cross-action alleging fraud by the plaintiff in the procurement of the policies of insurance on which the action was brought. The counterclaim prayed for the cancellation of such policies and for a permanent injunction against the prosecution of any action thereon. The District Court granted to the defendant an order that the issue of fraud and of cancellation be tried and decided before any trial of the plaintiff's action to recover on the policies. The Supreme Court held that such an order was in effect a temporary injunction granting interim part of the very relief by way of permanent injunction prayed for in the counterclaim, and that, therefore, it was appealable. The Supreme Court said (p. 192):

> "The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case."

The Supreme Court in no way intimated that an ordinary stay in the procedural development of an equity action—as, for example, a stay pending compliance with an order for security of costs—was henceforth to be regarded as an interlocutory order of injunction and appealable as such.

This basic distinction has been recognized and pointed out in many judicial decisions since the *Enelow* and *Ettelson* cases. See, for example, *Dowling Bros. Distilling Co.* v. *United States*, 153 F. (2d) 353, decided by the Circuit Court of Appeals for the Sixth Circuit in 1946. In that case, in recognizing and developing this distinction, the Circuit Court of Appeals said (p. 356):

> "Its characterization as an injunction is rested on *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55

S. Ct. 310, 79 L. Ed. 440, wherein it was held that a refusal by a court of equity to stay proceedings at law, is a grant or refusal of an injunction appealable under section 227. As pointed out, however, in *United States* v. *Horns,* 3 Cir., 147 F. 2d 57, the Supreme Court made it clear in the *Enelow* case, that if a court of law itself grants a stay of proceedings before it, the stay is not an injunction but merely an exercise of the court's inherent power to control the progress of a cause before it, so as to maintain the orderly processes of justice. It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to the grant or refusal of an injunction, and this distinction was stressed in *Cover* v. *Schwartz,* 2 Cir., 112 F. 2d 566. Compare *Triangle Conduit & Cable Co.* v. *National Electric Products Corp.,* 6 Cir., 127 F. 2d 524. With this view we are in accord. It follows that the appeal in No. 10,009 must be dismissed."

In *Cover* v. *Schwartz,* 112 F. 2d 566 (C. C. A. 2nd) the plaintiff brought suit for a patent infringement. Some two years later the defendant asked that the trial be stayed until determination of certain proceedings by the Court of Customs. The District Court granted such a stay and the plaintiff appealed. After stating that the order staying the trial was obviously not a "final decision" appealable under Section 128 of the Judicial Code, the Circuit Court of Appeals held that the order appealed from did not amount to an interlocutory injunction within the meaning of Section 129 of the Judicial Code and dismissed the appeal. The Court said (p. 567):

"In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of its control over the cause pending before it. It affects only the time of trial and amounts to nothing more than a continuance. It

is not analogous to a stay against proceedings in another cause or to a stay granted under section 274b of the Judicial Code. A trial in the present case will be held and the issues tried out if the parties insist, whatever the outcome of the case in the Court of Customs and Patent Appeals."

The above case was followed in *United States* v. *Horns*, 147 F. 2d 57 (C. C. A. 3rd) wherein the Circuit Court said (p. 60):

"We turn next to the more difficult question whether the order under attack, insofar as it was a denial of the requested stay of the criminal proceedings, is an order denying an injunction and therefore appealable under Section 129 of the Judicial Code, 28 U. S. C. A. §227. The difficulty arises from the fact that it has been held by the Supreme Court that the grant or refusal by a court of equity of a stay of proceedings at law is a grant or refusal of an injunction and, therefore, appealable by virtue of Section 129. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440. *Shanferoke Coal & Supply Corporation Co.* v. *Westchester Service Corporation*, 1935, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583.

In the *Enelow* case the Supreme Court, however, made it clear that if a court of law itself grants a stay in proceedings before it or a court of equity grants a stay in proceedings before it the stay is not an injunction. In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice. It is only when the power possessed by a court of equity to stay proceedings in another court is exercised that the court's action amounts to the grant or refusal of an injunction. This distinction was stressed in *Cover* v. *Schwartz*, 2 Cir., 1940, 112 F. 2d 566, and is controlling here."

To the same effect are:

United States v. *Mayfair Meat Packing Corp.*, 158 F. 2d 685; certiorari denied, 331 U. S. 805;

Dowling Bros. Distilling Co. v. *United States*, 153 F. 2d 353, 356 (C. C. A. 6th); certiorari denied (*Gould* v. *U. S.*, 328 U. S. 848);

Triangle Conduit & Cable Co. v. *National Electric Products Corporation*, 127 F. 2d 524, 525 (C. C. A. 6th);

Emery v. *Central Trust and Safe Deposit Co.*, 204 Fed. 965 (C. C. A. 6th);

Beckhardt v. *National Power & Light Co.*, 164 F. 2d 199 (C. C. A. 2nd).

In *Aspinook Corp.* v. *Bright, District Judge*, 165 F. 2d 294, certiorari denied 333 U. S. 846, March 8, 1948, District Judge Bright had refused to compel the plaintiff in a derivative action to furnish a bond in the sum of $90,000 under Section 61(b) of the New York General Corporation Law. The Circuit Court of Appeals for the Second Circuit denied a petition by the defendant corporation for mandamus on the ground that "there seems no occasion to call into play this extraordinary remedy" (p. 295). The Supreme Court of the United States, on March 8, 1948, denied a petition for a writ of certiorari, and also denied a motion for leave to file a petition for a writ of mandamus (333 U. S. 840). Since the implication of that decision is that an order denying both the bond and the accompanying stay was not appealable under Section 129, an order granting a bond and accompanying stay would also not be appealable thereunder.

The action of the Circuit Court of Appeals in dismissing the appeal in the present case is not only not in conflict with any decision of any Circuit Court of Appeals rendered under like circumstances, but is in line with unbroken and consistent precedents and judicial interpretation of Section 129 of the Judicial Code.

POINT IV

Although the petitioner's attack on the constitutionality of Sections 61(b) and 64 of the General Corporation Law of the State of New York is irrelevant for the various reasons above stated, nevertheless it is appropriate to inform this Court that on July 16, 1948, the Court of Appeals of the State of New York unanimously upheld their constitutionality.

On July 16, 1948, in *Lapchak* v. *Baker*, Law Rep. News, July 30, 1948, page 2, the New York Court of Appeals unanimously affirmed a decision of the Special Term of the Supreme Court of the State of New York dismissing a complaint in a derivative stockholder's suit because of the plaintiff's failure to furnish a required bond in the sum of $25,000 as security for the defendants' costs, legal fees and other expenses under Section 61(b) of the General Corporation Law of the State of New York.

In affirming the constitutionality of that Section and of the related Sections 64 and 68, the Court of Appeals said:

> "In giving his executive approval to section 61-b, the Governor of the State issued a memorandum (Public Papers of Governor Dewey (1944), p. 255) in which he made the following commentary upon stockholders' derivative actions: 'In recent years a veritable racket of baseless lawsuits accompanied by many unethical practices has grown up in this field. Worse yet, many suits that were well based have been brought, not in the interest of the corporation or of its stockholders, but in order to obtain money for particular individuals who had no interest in the corporation or in its stockholders. Secret settlements—really pay-offs for silence—have been the subjects of common suspicion.' The existence of some of these evils is here conceded. Moreover, the Legislature, as we must assume, in-

quired and found (1) justification for making special provision in respect of derivative suits brought by holders of relatively small amounts of a corporation's stock and (2) occasion for requiring plaintiffs in such suits to give reasonable security for litigation expenses of defendants therein. (See *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258; *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 190-191; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, 628, affd. 326 U. S. 230.) Of course, it is not for us to question the wisdom of the choice of remedy here adopted by the Legislature.

On this record, then, section 61-b cannot be held to be so palpably arbitrary or unduly discriminatory as to be obnoxious either to the due process clause or to the guaranty of the equal protection of the laws.

The judgment should be affirmed, with costs."

POINT V

Finally, although any questions as to whether the District Court had power, discretionary or otherwise, to apply Sections 61(b) and 64 of the General Corporation law of the State of New York is irrelevant for the various reasons above stated, nevertheless the reasons of fact and of law assigned by the District Court for its determination were clearly justifiable and do not fall within the special considerations controlling the granting of a writ of certiorari.

These reasons are fully stated in the portion of the opinion of the District Court beginning at the bottom of page 6 of the Record.

We particularly emphasize the case of *Angel* v. *Bullington*, 330 U. S. 183, cited therein (R. p. 8), and the decisions of this Court cited in the *Angel* case. As said in the *Angel* case:

> "Diversity jurisdiction must follow state law and policy. A Federal Court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Of the North Carolina statute involved in that case, the North Carolina Supreme Court had said (according to the quotation therefrom on page 187 of the decision of this Court):

> " 'The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantial law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State.' "

This decision is the more applicable because the New York Court of Appeals has held that Section 61(b) of the General Corporation Law of that State "differs from (such) purely procedural statutes both in purpose and effect" and, on behalf of the corporation sued derivatively, "creates a remedy for a wrong for which previously there was no remedy." (*Schielcrawt* v. *Moffett*, 294 N. Y. 180, 190.)

We also emphasize *Sioux County* v. *National Surety Co.*, 276 U. S. 238, which held applicable in the federal court a state statute which required in certain insurance cases that the plaintiff give security for the defendant's costs and expenses, including reasonable attorney's fee.

POINT VI

The motion for leave to file a petition for a writ of certiorari under Section 262 is without merit for the reasons above stated, and also because such a motion will be granted only "in exceptional circumstances", and will not be granted where an adequate remedy may be had in a lower Federal Court or where the petitioner has not exhausted his rights and opportunities reserved to him by the lower court.

Ex parte Abernathy, 320 U. S. 219.

The statutory policy against piecemeal appeals should be controlling.

CONCLUSION

The petition and motion should be denied.

Dated, August 19, 1948.

Respectfully submitted,

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CHARLES H. TUTTLE,
LLOYD V. ALMIRALL,
WILLIAM G. MCKNIGHT, JR.,
Of Counsel.

MOTION FILED APR - 4 1949

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 156.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MacDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MacDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION OF THE PETITIONER FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE, OUT OF TIME, WITH MEMORANDUM OF LAW THEREON.

EDWARD F. CLARK,
Counsel for Petitioner,
60 Wall Street,
New York City (5), N. Y.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1948.

No. 156.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

Motion of Petitioner for Leave to File, Out of Time, Petition for Rehearing.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now MARGARET C. DONOVAN, the petitioner in the above-entitled cause and moves, by Edward F. Clark, her counsel, that leave be granted to file out of time the attached petition for rehearing of her applications for certiorari herein, and in support thereof states:

1. That on October 11th, 1948, this Honorable Court denied her petition for writs of certiorari pursuant to Sec. 240-a of the Judicial Code (now covered by Sec. 1254(1) of the New Federal Judicial Code, (October Term, 1948, No. 156) and also denied her simultaneous petition pursuant to Sec. 262 of the Judicial Code (now covered by Sec. 1651(a) of said New Code) (October Term, 1948, No. 49, Miscellaneous).

2. That on or about September 22, 1948 (though not officially reported until November 22, 1948) a

conflict of decisions on the issue involved herein developed (as described in the annexed petition) between the decision of the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, and the decision herein of the United States Court of Appeals, Second Circuit. (Said *Cohen* decision was first officially published in Advance Sheet No. 1 of 170 F. 2d dated November 22, 1948.)

3. That this Honorable Court on February 28, 1949 granted a writ of certiorari to review the aforesaid decision of the United States Court of Appeals, Third Circuit.

4. That this petition for rehearing was not sooner presented because the aforesaid conflicting decision of the Third Circuit, as above stated, was not officially reported until November 22nd, 1948, a date subsequent to the time permitted by the Rules of this Court to petition herein for rehearing as of course, and neither petitioner nor her counsel were informed until very recently either of said decision or of the granting of writ of certiorari therein.

WHEREFORE, it is respectfully requested that leave to file, out of time, the annexed petition for rehearing be granted.

Respectfully submitted,

EDWARD F. CLARK,
Counsel for Petitioner.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. 156.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

Petition for Rehearing.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now MARGARET C. DONOVAN, the petitioner in the above-entitled cause, and presents, by her counsel Edward F. Clark, her petition for a rehearing of her petitions for a writ of certiorari herein and respectfully shows to this Honorable Court as follows:

1. On or about July 22nd, 1948 your petitioner filed her petition (No. 156, October Term, 1948) for a writ of certiorari pursuant to Sec. 240-a of the Judicial Code, and simultaneously moved for leave to file and did file a petition (No. 49, Miscellaneous, October Term, 1948) for a writ of certiorari pur-

suant to Sec. 262 of the Judicial Code, to the United States Circuit Court of Appeals, Second Circuit, together with brief in support of said petitions and the transcript of the record. Said Sec. 240-a is now covered by Sec. 1254(1) of the New Federal Judicial Code and said Sec. 262 by Sec. 1651 (a) of said New Code. For convenience said former numbers will be hereinafter used with reference to proceedings had before the New Code became effective.

2. That the questions presented and reasons relied on in said petitions may be summarized as follows, being more fully set forth in the petitions, brief and transcript of record filed with this court pursuant to the aforesaid sections of the Judicial Code.

SUMMARY OF QUESTIONS PRESENTED.

(a) Whether the federal District Court, where jurisdiction is based on diversity of citizenship, *must* give effect to Sec. 61-b and 64 of the General Corporation Law of New York requiring plaintiff, in a derivative stockholders action, under circumstances set forth in the statute, to give security for expenses, including counsel fees.

(b) Whether such a statute may in such court be given effect within the discretion of the District Court, and if so whether the District Court did not abuse its discretion in the instant case where the effect of its order requiring security would make it impossible for plaintiff to prosecute her suit.

(c) Whether the said statute, inherently and as applied in the present case, is not in violation of Sec. 1 of Amendment XIV of the United States Constitution.

(d) Whether the order requiring such security and the stay imposed thereby did not, under the circumstances shown in said petitions and record, constitute a final determination appealable under Sec. 128 of the Judicial Code (now covered by Sec. 1291 of the New Judicial Code) or an injunction appealable under Sec. 129 of the Judicial Code (now covered by Sec. 1292 (1) of said New Code).

Summary of Reasons.

(a) The important questions of federal law not previously decided, relating to

(1) The applicability in the federal courts of statutes requiring such security and their constitutionality.

(2) The finality and appealability of orders in the federal courts requiring such security pursuant to state statutes.

(3) The appealability of such orders, under former Judicial Code Sec. 129, as injunctions by reason of the stay imposed therein.

(b) The substantial public interest to be served by determination of the important questions involved, in view of the adoption of such state statutes in a considerable number of states and the diversity of application thereof in the various federal courts.

(c) The conflict between the New York Statutes (General Corporation Law, 61-b, 64) and similar statutes of other states, and the Federal Rules of Civil Procedure. (See Report of Advisory Committee on Rules for Civil Procedure 5 F. R. D. 433, 451.)

3. That on October 11th, 1948 this Court denied the aforesaid petitions for certiorari.

4. That on or about September 22nd, 1948, the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, considering a substantially identical statute of New Jersey, held an order of the New Jersey District Court appealable, which had denied the defendant's motion for security, and reversed such order. That such decision of the Third Circuit constitutes a conflict of decisions with the Second Circuit on the question of finality and appealability of orders relating to security under such state statutes, the Second Circuit having held the order for security in your petitioner's case to be non-appealable. The said conflict has arisen subsequent to the filing of your petitioner's aforesaid petitions for writ of certiorari and the said Third Circuit decision was first officially reported on November 22nd, 1948, in the Advance Sheet of 170 F. 2d of that date, subsequent to the denial of certiorari herein.

5. That this Court on February 28th, 1949 granted a writ of certiorari to review the aforesaid determination of the United States Court of Appeals, Third Circuit.

6. This application is made out of time and at this date because the decision of the Third Circuit was not officially reported until November 22nd, 1948, and did not come to the attention of petitioner or her counsel until very recently—subsequent to this Court's denial of her petition for writ of certiorari. Moreover, neither petitioner nor her counsel were informed of the granting of certiorari in the *Cohen* case (supra) until March 14th, 1949.

7. Your petitioner verily believes that granting of this petition for rehearing is desirable for the following reasons:

(a) A conflict having developed subsequent to this Court's denial of her petition, and certiorari having been granted in the *Cohen* case referred to above, the granting of certiorari herein will give this Court the benefit of examination and argument of the additional or contrary aspects of the two cases arising in different circuits.

(b) It will enable this Court to do justice to the parties.

(c) It will dispose of the *entire* question of finality and appealability of orders relating to security under state statutes. The Third Circuit has in the *Cohen* case held an order *denying* security appealable. The Second Circuit, in *Thompson* v. *Broadfoot*, 165 F. (2d) 744 (referred to in *Aspinook Corp.* v. *Bright*, 165 F. (2d) 294) dismissed an appeal from an order denying security. Similarly, the Second Circuit in the instant case, *Donovan* v. *Queensboro Corporation*, dismissed an

appeal from an order *granting* security holding such order to be non-appealable. Accordingly, the present circumstances afford this Court an unusual opportunity to effect clarification of the entire question and thus avoid the possible need of further review in a case similar to your petitioner's.

(d) The need for a settlement by this Court of any conflict between the New York Statutes (General Corporation Law, 61-b, 64) and similar statutes of other states, and the Federal Rules of Civil Procedure.

(e) The issues presented on the question of finality and appealability as set forth in your petitioner's papers are broader in scope, involving, as they do, not only the question of finality under Sec. 128 of the Judicial Code (now Sec. 1291 of the New Judicial Code), but also the question of appealability of decisions constituting, in substance and effect, injunctions within the meaning of Sec. 129 of the Judicial Code (now Sec. 1292 (1) of said New Code).

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals, Second Circuit, commanding said Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record of the proceedings of the said Circuit Court had in this case entitled on its docket, "Margaret C. Donovan, Plaintiff-Appellant against Queensboro Corpo-

ration, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased" (No. 21000); to the end that this cause may be reviewed both under the aforesaid Section 240-a now Sec. 1254 (1) and Section 262 now Sec. 1651 (a) of the Judicial Code and the rules of this Court and determined by this Court as provided for by the statutes of the United States; or, in the alternative, that this Court proceed under Sec. 262 of the Judicial Code (now Sec. 1651 (a) of the New Code), in accordance with petitioner's separate petition filed under the number 49 Miscellaneous, to review the entire question before the District Court in accordance with the practice followed by this Court in the case of *Matter of 620 Church Street Building Corp.,* 299 U. S. 24; and that the order herein of the said Circuit Court of Appeals refusing to hear the petitioner's appeal from the District Court be reversed by this Court; and that this Court reverse the order of the District Court from which the petitioner's appeal was sought to be taken; and for such further relief as to this Court may seem proper.

Dated: New York City, N. Y., March 30, 1949.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Counsel for Petitioner.

Certificate of Counsel.

I, Counsel for the above-named Margaret C. Donovan, petitioner and movant, do hereby certify that both the foregoing petition for rehearing of petitioner's application for writs of certiorari herein and the foregoing motion for leave to file, out of time, said petition for rehearing are presented in good faith, not for delay, and made upon grounds not previously urged due to circumstances which have arisen since the date of the original petitions, namely, (1) that since the filing of said original petitions on or about July 22nd, 1948 a conflict of decisions as to appealability has arisen between the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, and the decision of the United States Court of Appeals, Second Circuit, in this case, and (2) that since said conflict arose this Court has granted certiorari in said *Cohen* case; and, in the judgment of counsel, said grounds are well founded in law and in fact.

And I do further certify that said petition and motion for rehearing are restricted to the grounds above specified.

EDWARD F. CLARK,
Counsel for Margaret C. Donovan,
Petitioner and Movant.

March 30, 1949.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. 156.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

MEMORANDUM OF LAW.

The Conflict of Decisions.

A. *Cohen* v. *Beneficial Industrial Loan Corporation, et al.*, 170 F. 2d 44 (U. S. C. A., 3rd Circuit), decided September 22, 1948 (first officially reported November 22, 1948), reversing order of U. S. District Court, New Jersey, reported at 7 F. R. D. 352; certiorari granted February 28, 1949.

This case, arising in the United States District Court, District of New Jersey, was a derivative stockholders suit, jurisdiction being based on diversity of citizenship.

Plaintiffs held approximately one hundredth of one per cent of the stock of defendant corporation, the

complaint alleging, at considerable length, mismanagement and fraud (170 F. 2d 44 at p. 47). The District Court denied a motion of the defendant corporation for an order requiring plaintiffs to give $125,000 security under the New Jersey Statute (2 N. J. R. S. Cum. Supp. 14:3-15), a statute substantially identical with Sec. 61-b of the New York General Corporation Law.

On appeal to the U. S. Court of Appeals, Third Circuit, that Court said (170 F. 2d 44 at p. 49):

> "Preliminarily we must determine whether the order of the Court below is appealable."

and again at page 49:

> "We are not unmindful of the provisions of R. S. 14:3-15 which state that the corporation 'at any stage of the proceeding' may make application for security but the court below deemed the statute inapplicable to the instant case at any time. It follows therefore that without the right to sustain an appeal Beneficial could never gain the security to which it is entitled if the statute is applicable for a writ of mandamus could issue from this court only in aid of its appellate jurisdiction. * * * We hold the order to be appealable."

B. ***The case at bar***—*Donovan* v. *Queensboro Corporation, et al.*, 75 F. Supp. 131 (opinion of District Court) (R. 4-9) appeal dismissed on motion (R. 23, 35); certiorari denied (October 11, 1948) 93 L. Ed. Adv. Op. 26.

This case also is (in part) a derivative stockholder's suit, instituted in the U. S. District Court,

E. D. N. Y., the basis of jurisdiction being diversity of citizenship.

The petitioner-plaintiff is the holder of voting trust certificates for 111½ shares of stock of defendant Garden Housing Corporation out of a total of 4730, or approximately 2.35%, having a par value of $11,150 and a claimed value of $39,000 (R. 22). The defendant Garden Housing Corporation was the owner and operator of an apartment development, and the defendant Queensboro Corporation owned or controlled directly or indirectly 87% of its stock. The primary relief sought by plaintiff is against the Queensboro Corporation as the wrongful recipient and beneficiary of assets of Garden Housing Corporation allegedly wasted, mismanaged and misappropriated, by the defendants through the domination and control exercised by defendant Queensboro (R. 24, 25). The inability of petitioner-plaintiff to acquire or enlist in her cause 5% of the total stock—the statutory requirement to avoid security—was called to the attention of the Court of Appeals (R. 25, 26).

The defendant corporation moved in the District Court for $50,000 security for expenses and counsel fees, pursuant to the New York statute, which was granted, the District Court finding such amount to be fair and reasonable; and all proceedings on plaintiff's part were stayed pending deposit of the security except for review, modification or vacation of the order (R. 11). The plaintiff showed by affidavit her inability to furnish other than the usual $250 security for costs and asked that the order provide for dismissal of the complaint within a fixed time upon failure to provide the security, so as to eliminate

any doubt as to finality. Such application was denied (R. 11, 12).

An appeal by plaintiff to the Circuit Court of Appeals, Second Circuit, was dismissed, on the ground the order of the District Court was non-appealable (R. 23), and plaintiff's petition for rehearing denied (R. 35).

Petitioner's petitions for writs of certiorari pursuant to Secs. 240-a and 262 of the Judicial Code were filed July 22, 1948 and denied by this Court on October 11th, 1948 (93 L. Ed. Advs. Op. 26).

Although the appeal to the Court of Appeals from the District Court did not bring up all of the papers which were before the District Court, the record as presented to the Court of Appeals and to this Court is completely adequate to raise all essential questions. Plaintiff's complaint, which was before the District Court, was handed up to the Court of Appeals, and in the petition for rehearing filed before the Court of Appeals, the essential allegations of the complaint and the facts pertinent to the issue of security under 61-b were fairly and adequately restated (R. 24-29).

Granting of Certiorari Herein Will Necessarily Bring About More Complete Argument and Examination of the Question in Conflict.

In *R. Simpson & Co. Inc.* v. *Comm.*, 321 U. S. 225 at 229, this Court states:

> "It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the con-

troversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects of the question presented by the case."

That there are additional and contrary aspects of the two cases in conflict is clear from reference to the varying facts in each case.

The petitioners in the *Cohen* case represent a microscopic fraction (1/100 of 1%) of the ownership of a large corporation ($90,000,000 in assets). The petitioner in the instant case is a relatively substantial holder (2.35%) of shares in a small corporation whose stock is closely held. She presents the situation of a share-partner in a small business enterprise who can have no recourse against an over-reaching majority interest under circumstances where the requisite 5% of capital stock cannot be acquired and the security requirement is so drastic as to deprive her of her "day in court".

Moreover in the instant case, although the action is necessarily derivative in part, the major relief is sought against another corporation, dominating and controlling Garden Housing Corporation, the business corporation of which plaintiff is a part owner. The defense of the action would therefore be sustained by such outside corporate defendant and not by the Garden Housing Corporation. The only justification or reason for the New York statutes, 61-b and 64 of the General Corporation Law, would, therefore, be inapplicable.

Failure to afford relief in such circumstances sets a precedent for denial of an effective remedy to any business man or investor in a small corporation who in many instances would be unable to acquire the necessary 5% interest because of the controlling inter-

est by the very persons of whose wrongdoing he may be complaining.

The Granting of the Petition Will Enable This Court to Do Justice to the Parties.

In addition to what has been said above, it is desired here to re-emphasize the fact that petitioner has—by the unreversed decisions of the District Court—been effectively denied access to the Court and the opportunity of ever having her case considered on the merits. This results from the impossibility of plaintiff complying with the "5% or $50,000 market value" provisions of the state statute and her sworn inability to post the $50,000 security as ordered (R. 27). The truth of such allegation is now further evidenced by the lapse of time during which she has been powerless to proceed with her case in the District Court.

The Granting of the Petition Will Result in a More Complete Disposition of the Question in Conflict.

In the *Cohen* case the Third Circuit held appealable an order *denying* security. In the instant case the Second Circuit held non-appealable an order *granting* security.

It is entirely possible that a determination by this Court in the *Cohen* case would not necessarily preclude the question presented in the instant case from again arising and ultimately requiring separate disposition by this Court.

The very manner in which the two cases came before the respective Circuits affords the possibility that subsequently subtle distinctions may be drawn by attorneys or judges in applying any decision of this Court reached on consideration of the *Cohen* case alone.

The wholly different background, as between the State of New Jersey and the State of New York, with respect to the time honored practice in New Jersey of requiring unsuccessful litigants to pay a counsel fee, should also receive attention in connection with the consideration of the constitutional question, particularly with respect to the question whether or not the statute in New York is not harsh and discriminatory. It has always been the practice in New Jersey Chancery that the unsuccessful litigant may be required—and usually was—to pay the counsel fees of the successful litigant in substantial amounts.

> *Rothenberg* v. *Franklin Washington Trust Co.*, 131 N. J. Eq. 463 (Headnote 2).

It has been expressly authorized by a New Jersey statute (N. J. S. A. 2:29-131).

In New York, on the other hand, all efforts to expand the burden upon the unsuccessful litigant beyond relatively minor costs, have been continuously resisted. There has been only one exception, and that seldom applied, namely, that in a *difficult and extraordinary case,* the unsuccessful litigant may be required to pay up to, but not more than $2000. That is the maximum sum permissible irrespective of the amount involved or the number of successful parties in the litigation (N. Y. Civ. Pr. Act. Secs. 1513, 1514).

> *Manko* v. *City of Buffalo,* 271 App. Div. 286, affd. 296 N. Y. 905;
> *Duncan* v. *Dewitt,* 7 Hun 184;
> *Fry* v. *N. Y. C. etc. R. R. Co.,* 114 App. Div. 623.

Accordingly, in view of the long established and consistent attitude of the New York courts and legislature limiting recovery of anything but restricted

statutory costs, it may seriously be doubted whether Sec. 61-b (adopted without legislative hearings, *New Aspects of Stockholders' Derivative Suits,* 47 Columbia Law Review, 1, 2) represents such an established policy of the State of New York that effect must be given to it in the federal courts.

The Instant Case Presents a More Definitive Question of Finality and Appealability.

A. Upon the question of finality, the order of the District Court in the instant case, requiring $50,000 security from a plaintiff unable to furnish anything but nominal security for costs, means the ending of that litigation without any possibility of the plaintiff being heard on appeal. In the *Cohen* case, on the contrary, the only damage that would have been suffered would be the possible loss of counsel fees to the successful litigant due to the fact that the unsuccessful litigant had become financially irresponsible.

B. The instant case presents directly for consideration of the Court the question of appealability of the order of the District Court under former Section 129, on the ground that the stay contained therein constitutes an injunction. Certainly, the order of the District Court has so far had the complete effect of an injunction, in view of the demonstrated inability of the plaintiff to proceed with her case.

Respectfully submitted,

EDWARD F. CLARK,
Counsel for Petitioner.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

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Supreme Court of the United States

October Term, 1948

No. 156
No. 49 MISCELLANEOUS

MARGARET C. DONOVAN,

Petitioner,

against

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

RESPONDENTS' ANSWER OPPOSING PETITION FOR REHEARING

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SUBJECT INDEX

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POINT I. As we showed in opposition to the former application, that petition and motion were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was not previously presented here, and is not now presented here 3

POINT II. Furthermore, the plaintiff never presented any case within the settled rules for the issuance of a writ of certiorari.

The District Court's order of November 24, 1947, was not final. At the plaintiff's own request it was made merely tentative and subject to the plaintiff's right to move in the District Court for "the modification or vacation thereof" upon further matters of fact or of law or of argument.

The plaintiff has never availed herself of the provisions and remedies which she herself caused to be inserted for her own benefit in the order of the District Court 4

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Supreme Court of the United States

October Term, 1948

No. 156
No. 49 MISCELLANEOUS

MARGARET C. DONOVAN,

Petitioner,

against

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

RESPONDENTS' ANSWER OPPOSING PETITION FOR REHEARING

Six months after the plaintiff's petition for a writ of certiorari was denied on October 11, 1948, she now petitions for a rehearing on the asserted ground that this Honorable Court had, on February 28, 1949, granted a writ of certiorari in the case of *Cohen* v. *Beneficial Industrial Loan Corporation*, 170 F. 2d 44.

The respondents oppose the present petition on the same grounds as they urged in their Brief in opposition to the former petition.

The respondents further show (1) that the situation and the controlling facts in the present case are, as shown in Points I and II, *post,* altogether different from those in the *Cohen* case; (2) that the plaintiff's present petition for rehearing does not acknowledge the existence of these controlling differences but attempts an argument *in vacuo;* and (3) that there is no conflict between the decision of the United States Court of Appeals for the Second Circuit in the present case and the decision of the United States Court of Appeals for the Third Circuit in the *Cohen* case.

The controlling differences in the present case are:

1. The plaintiff's original petition and motion in this Court were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was never presented to this Honorable Court in connection with the former petition for a writ of certiorari, and is not now presented.

The respondents urged this consideration in Point I II (p. 6) of their former brief in this Honorable Court. They now present it again in Point I, *post.*

2. In no event could the order of the District Court in the present case be considered as final.

At the plaintiff's own request, it was made tentative and she was therein given an opportunity to "obtain the modification or vacation" thereof,—a privilege which she has never exercised since that order was entered as far back as November 24, 1947.

The respondents urged these considerations in Point II (p. 6) of their former brief in this Honorable Court. They now present them again in Point II, *post.*

POINT I

As we showed in opposition to the former application, that petition and motion were without the necessary record and without foundation or merit.

Basically, the plaintiff sought a review of the District Court's order of November 24, 1947; but the record on which such order was made was not previously presented here, and is not now presented here.

The only record presented to this Court is the record of the following proceedings in the United States Court of Appeals:

1. Notice of motion and affidavit to dismiss the appeal;
2. Two affidavits in opposition;
3. Order dismissing the appeal;
4. Petition for rehearing and certification of questions;
5. Order denying such petition.

The District Court's order of November 24, 1947, (which is the order from which the petitioner attempted to appeal) is in the record solely as Exhibit "B" attached to the defendants' motion for dismissal in the Court of Appeals.

That order recites, as the record on which it was based: the amended complaint, the notice of motions to dismiss the amended complaint or, in the alternative, for security for expenses, the affidavit of Charles H. Tuttle in support of such motions, various exhibits attached thereto, and the affidavits of Edward F. Clark and Margaret C. Donovan in opposition.

None of these papers is in the record formerly or now presented to this Court.

On this record, therefore, it would not be possible to review that order or the order of the United States Court of Appeals dismissing the appeal therefrom.

The refusal of the Court of Appeals to grant a rehearing or certify questions was purely discretionary and presents nothing for consideration by this Honorable Court.

POINT II

Furthermore, the plaintiff never presented any case within the settled rules for the issuance of a writ of certiorari.

The District Court's order of November 24, 1947, was not final. At the plaintiff's own request it was made merely tentative and subject to the plaintiff's right to move in the District Court for "the modification or vacation thereof" upon further matters of fact or of law or of argument.

The plaintiff has never availed herself of the provisions and remedies which she herself caused to be inserted for her own benefit in the order of the District Court.

(1) This action by the petitioner as plaintiff was brought in the United States District Court for the Eastern District of New York, allegedly in a derivative right as the holder of a voting trust certificate for 111½ shares (2.35%) of the outstanding capital stock of the defendant, Garden Housing Corporation. She demanded a receiver and an accounting (R. p. 2).

On October 10, 1947, the defendants moved to dismiss the amended complaint and, in the alternative, that the plaintiff be required, under Sections 61(b) and 64 of the

General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which might be incurred by that corporation and by the other parties-defendant in connection with the action, and that, pending the deposit of such security, further proceedings on the plaintiff's part be stayed (R. p. 2).

On November 17, 1947, the Court (Judge Inch) delivered an opinion denying the motion to dismiss but granting the alternative prayer for security in the sum of $50,000 (R. p. 4).

On November 24, 1947, the District Court entered on this decision an order, the directing portions of which read as follows (R. pp. 9-11):

> "Ordered, that the motions by the defendants to dismiss the complaint be and the same hereby are denied; and it is further
>
> Ordered, that the motion by the defendants for security be and the same hereby is granted, and the plaintiff be and she hereby is required, pursuant to the provisions of Sections 61(b) and 64 of the General Corporation Law of the State of New York, to give to the defendant Garden Housing Corporation security satisfactory to this Court in the amount of $50,000 for the reasonable expenses, including attorneys' fees, which may be incurred by said Garden Housing Corporation and by the other parties defendant in connection with this action, for which said Garden Housing Corporation may become subject; and it is further
>
> Ordered, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the*

modification or vacation thereof be and the same hereby are stayed; and it is further

Ordered, that the time for the defendants to move to or answer the amended complaint herein be and the same hereby is extended 20 days after the deposit of the aforesaid security by the plaintiff with notice to the defendants." (The italics are ours.)

The words italicized were inserted *at the request of plaintiff's counsel* on the settlement of the order.

These words were intended by the plaintiff's counsel to keep the door open, and by the court as an invitation, for the plaintiff to come back to the District Court with further matters of fact or of law or of argument if she so desired.

On November 28, 1947, instead of availing themselves of the opportunity which they and the court had thus reserved to them, the plaintiff's attorneys moved to add to this order a provision that, in the event the required security were not given within ten days, the amended complaint be automatically dismissed (R. p. 3).

This motion was denied by the Court with the following memorandum (R. p. 3):

"Dec. 12, 1947
This motion is denied.
I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me. That was all before the Court as I had denied the motion to dismiss the complaint on the grounds urged by the defendant and ordered security to be furnished. Anything else, such as a new motion to dismiss must await a motion by defendant if and when made.

Robert A. Inch."

The order of denial was dated December 19, 1947 (R. pp. 3, 11).

On December 24, 1947, the plaintiff served a notice of appeal to the Court of Appeals for the Second Circuit from the aforesaid order of November 24, 1947, and from the aforesaid order of December 19, 1947 (R. p. 13).

The defendants thereupon moved in the Court of Appeals to dismiss the appeal "because the orders sought to be reviewed are not final decisions and are not appealable" (R. pp. 1-4). On March 23, 1948, this motion was unanimously granted, without opinion (R. p. 23).

Subsequently, the plaintiff petitioned the Court of Appeals for a rehearing or, in the alternative, for a certification of alleged questions to this Court (R. pp. 24, 29). This petition was denied, without opinion, by order entered April 16, 1948 (R. p. 35).

The plaintiff then petitioned for a writ of certiorari to the Court of Appeals or, in the alternative, for a writ under Section 262 of the Judicial Code. This petition was denied by this Honorable Court on October 11, 1948 (*Law ed. Advance Opinions*, Vol. 93, p. 26).

(2) As set forth above in the Preliminary Statement, the District Court, in settling its order of November 24, 1947, accepted the counter-form proposed by the plaintiff's own counsel who successfully urged that, for her benefit, there should be included in the directive portion the following words which we italicize (R. pp. 3, 16):

> "ORDERED, that pending the deposit of the security as aforesaid all further proceedings on the part of the plaintiff except to comply with the terms of this order and *except to review this order or to obtain the modification or vacation thereof* be and the same hereby are stayed."

The plaintiff has never availed herself of this saving clause sought and obtained by her for her own relief and benefit. In asking for it, she impliedly represented her intention to use it. The fact, however, is that she has never presented to the District Court an application for a reconsideration or any new matter of fact or of law or of argument for the modification or vacation of the order or of the security thus ordered only tentatively.

Instead, on November 28, 1947, she moved the District Court for the addition of a further provision that, in the event that the security be not furnished within ten days, the amended complaint be automatically dismissed. This motion was denied (R. p. 3). The granting of it would have enabled the plaintiff herself to achieve automatically the very dismissal which she herself had opposed and which the District Court had refused, by the simple stratagem of not complying within ten days with the requirement for security. In denying this motion, the District Court said (R. p. 3):

> "I signed the form of order submitted by plaintiff as I felt she could object to the amount of security fixed by me."

(3) Furthermore, notwithstanding this express invitation by the District Court to the plaintiff, she once again deliberately omitted to avail herself of the opportunity for relief thus held open to her for a second time by the District Court,—and this notwithstanding that in their affidavit in opposition to the defendants' motion to dismiss her ensuing appeal, the plaintiff's counsel acknowledged that they recognized that this second invitation by the District Court was "an intimation" of a "possible reconsideration of the amount of security" (R. pp. 17, 18).

(4) For these several reasons, the order of November 24, 1947, was in no sense final even as a temporary deter-

mination. It was merely tentative, and was twice expressly held open by the District Court for reconsideration by it if the plaintiff would move therefor.

The plaintiff should have exhausted her opportunities in the District Court before attempting to appeal from an order which on its face and at her request was merely tentative and not final against her.

In consequence, the Court of Appeals had, in no event, jurisdiction to entertain an appeal therefrom while these remedies and opportunities were still available to the plaintiff in the District Court and were still unavailed of by her.

Like considerations were previously, and are now again, applicable in this Honorable Court.

(5) Parenthetically, it is noteworthy that the plaintiff's attorneys are, admittedly, themselves the real parties in interest,—"the beneficial owners" of the trust certificate (R. pp. 16, 17, 22).

The plaintiff states that she is not able to furnish the security (R. p. 17); but there is no such statement by her attorneys,—the real parties in interest (R. p. 22). They merely say that they are unwilling to "wager" such a sum "on the outcome of the suit" (R. p. 22). But they are perfectly willing to force the defendant Garden Housing Corporation to "wager" such a sum through the operation of Section 61(b) and 64 of the General Corporation Law of the State of New York; although they are unwilling to give it any security as against such enforced "wager".

The petition for rehearing should be denied.

Dated, April 9, 1948.

Respectfully submitted,

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CHARLES H. TUTTLE,
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MOTION FILED JUL 15 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MacDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MacDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE.

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EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. , Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Margaret C. Donovan, a resident of the State of New Jersey, moves the Court for leave to file the petition hereto annexed for a writ of certiorari under Judicial Code, Section 262 (28 U. S. C. 377) and further moves that an order and rule be entered and issued directing the Circuit Court of Appeals, Second Circuit, to show cause why a writ of certiorari should not be issued to said Court in accordance with the prayer of said petitioner and why the petitioner should not have such other and further relief in the premises as may be just.

Dated: July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Her Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. , Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS SECOND CIRCUIT UNDER JUDICIAL CODE, SECTION 262, AND SUPREME COURT RULE XXXIX.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Margaret C. Donovan respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The action upon which this petition is based is in part a stockholder's derivative action, brought by the petitioner, as plaintiff in the United States District Court for the Eastern District of New York, against stockholders, officers and directors of the defendant Garden Housing Corporation by reason of their wrongful and wasteful acts with respect to that Corporation's assets.

2. By an order made on November 24th, 1947, the District Court granted a motion of the defendants to the extent that it required the plaintiff to furnish security to the defendants for expenses including counsel fees, in the amount of $50,000 under the alleged requirement of Sections 61-b and 64 of the New York General Corporation Law and stayed all proceedings on the part of petitioner, as plaintiff, until she furnished such security (R. 9-11). Said District Court thereafter on December 19th, 1947, made a further order denying petitioner's application to modify such order so as to provide for a termination of the action by dismissal of the complaint if the $50,000 security should not be furnished within ten days (R. 11-12).

3. Petitioner appealed to the Circuit Court of Appeals, Second Circuit, from so much of said first order as imposed the stay and from the order secondly above mentioned (R. 13); which appeal was, on motion of the defendants (respondents here), dismissed by said Circuit Court of Appeals, without opinion (R. 23), and said Court subsequently on April 16th, 1948, denied petitioner's motion for a rehearing of the motion to dismiss the appeal, also without opinion (R. 35).

4. This petition, under Judicial Code, Section 262, which, under the calendar practice of this Court, will go on its Miscellaneous Calendar, is filed simultaneously with a petition for a writ of certiorari to the said United States Circuit Court of Appeals, Second Circuit, under Judicial Code, Section 240a (28 U. S. C. 347-a), and also under Judicial Code, Section 262, to review the same orders of said Circuit Court of Appeals. The two petitions thus seek alternative statutory methods of procedure for obtaining a review of the same orders of the Circuit Court of Appeals. There have been or will be filed with said petition under Judicial Code 240-a the required number of copies of the record and reference is hereby made to the said record for all facts appearing therein not herein

repeated; for the motion papers on the motion of the respondents to dismiss the appeal from the orders of the District Court hereinbefore mentioned, including the opinion of the District Court; for petitioner's papers in opposition to said motion; for petitioner's petition to the Circuit Court of Appeals for a rehearing of said motion to dismiss petitioner's appeal and for the orders of the Circuit Court of Appeals of which petitioner now seeks a review by this Court. Reference is also hereby made to petitioner's said petition under Judicial Code, Section 240-a, particularly to the summary statement therein, for all facts not contained in said record or in this petition under Judicial Code, Section 262.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to entertain this proceeding and to grant the relief prayed for by virtue of Judicial Code, Section 262 (28 U. S. C., Sec. 377) which is as follows:

> "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

While the procedure under the above quoted section appears to be more often resorted to on applications for writs of mandamus or prohibition, in cases such as *United States Alkali Export Association Inc.* v. *United States*, 325 U. S. 196, it was applied, for purposes of certiorari, directly to the U. S. District Court to review its order denying a motion of the defendants to dismiss a suit under the Sherman Act and in *DeBeers Consolidated Mines, Inc.* v. *United States*, 325 U. S. 212, to certiorari to the Dis-

trict Court to review its order granting a preliminary injunction against defendants in a like suit.

And in *Matter of 620 Church Street Bldg. Corp.*, 299 U. S. 24, this Court reviewed upon certiorari, which this Court had granted under Judicial Code 262, an order of the Circuit Court of Appeals denying leave to appeal from a District Court order in a bankruptcy matter. It is submitted that, for purposes of certiorari jurisdiction under said Section 262, the dismissal by the Circuit Court of Appeals of the appeal from the District Court, taken as of right in the instant action, is exactly analogous to the denial of leave to appeal by the Circuit Court of Appeals, in said *620 Church Street Bldg. Corp.* proceeding, so that said *620 Church Street Bldg. Corp.* decision is, for jurisdictional purposes, sufficient authority for this application for certiorari under Judicial Code 262.

Questions Presented and Reasons for the Allowance of the Writ.

These are the same, for purposes of this petition, as the questions presented and the reasons for allowance of the writ fully set out in said petition for certiorari under Judicial Code, Section 240-a and are hereby incorporated into this petition, by reference to said 240-a petition, with the same force and effect as though here fully repeated.

Brief in Support of Petition.

The brief printed, as attached to said 240-a petition, is hereby made by reference the brief in support of this petition with the same force and effect as though here fully repeated.

Dated: July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By Edward F. Clark,
Counsel for Petitioner.